BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

GENE DUARTE	)	
Claimant	)	
V.	)	
	)	Docket No. 1,048,166
AGCO CORPORATION	)	
Respondent	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the April 8, 2016, Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on August 19, 2016, in Wichita, Kansas.

APPEARANCES

Melinda G. Young, of Hutchinson, Kansas, appeared for the claimant. Robert M. Martin, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument to the Board, the parties acknowledged the filing of a stipulation which established claimant's average weekly wage at $735.89. Respondent also acknowledged that if claimant's date of accident is determined to be October 28, 2009, then notice of that accident would be timely.

ISSUES

The ALJ denied claimant's claim for compensation concluding:

> . . . Nearly all of the necessary elements necessary to comprise a compensable claim are denied.

> Compensability was denied in this matter at a preliminary hearing, the findings of which were affirmed by a single Board Member on May 19, 2010. . .
>
> The new evidence generated since that time is not in the least persuasive to show that the claimant has met his burden in showing that he suffered personal injury by a series of accidents, or that he ever gave notice of such an injury. There is simply no evidence of any notice to any identifiable person to any series of accidents in any of the claimant's testimony.[1]

Claimant failed to file a brief in support of his appeal at any level of these proceedings.

Respondent argues the denial of compensability should be affirmed, but the fees and expenses assessed against respondent should instead be assessed against claimant's counsel for the lack of merit in continuing to pursue this claim.

The issues are:

1. Did claimant suffer personal injury by a series of accidents which arose out of and in the course of his employment with respondent?

2. Did claimant give timely notice of such alleged injury? In order to determine this issue, the Board must first establish the appropriate date of accident.

3. Should claimant's counsel be assessed the litigation costs based upon the pursuit of a meritless claim?

FINDINGS OF FACT

Claimant alleges personal injury by accident each and every working day during his employment with respondent. Respondent denies this, along with personal injury by accident arising out of and in the course of his employment, notice, employer/employee relationship on the claimed date of accident and timely written claim. Claimant incurred a total of $35,832.42 in medical expenses, which have been turned in to, and paid by, his health insurance carrier.

Respondent builds farm equipment. Claimant's work for respondent was considered heavy labor and caused him to develop problems with his shoulders. He testified he would lift parts from a crate at floor level to a CNC machine at waist level, 15 to 20 times per shift, which lasted ten hours. Claimant gradually began to feel pain in his shoulders, the left preceding the right. After 90 days, claimant was moved to a different machine, requiring he lift heavier parts. His shoulders became noticeably worse on this new machine.

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[1] ALJ Award (Apr. 8, 2016) at 2-3.

Claimant testified he did not have problems with his shoulders when he started working for respondent, but admitted to prior shoulder problems in 2000 when he jumped off a cliff into some water. Claimant testified his shoulders improved from the accident in 2000. Claimant did not have extensive treatment for that injury, just pain medication. He testified it was about a year before he stopped thinking about his shoulder pain, "all the time".[2]

Claimant testified the current injury to his shoulders is due to the heavy lifting required in his job with respondent. He testified that the more he used his shoulders, the more they hurt. He also testified the heavier the lifting, the slower he worked and he worried about not being able to keep his job.

Claimant testified he reported his shoulder pain to a supervisor, perhaps named Linda, and the crew leader, Bob, indicating he thought he pulled a muscle or did something to his shoulder, because it hurt. Claimant testified he was told to take it easy the rest of the day as the shift was almost over, so that he would not miss work and get fired. Claimant testified he met with the company nurse and was instructed to rest for a bit. He alleges it was written down that he had back or muscle spasms. He waited about 30 minutes and then went back to finish out his shift.

Claimant went to Jerold Albright, M.D., on December 1, 2008, with shoulder complaints. Claimant mentioned an accident in 2000, when he injured his left shoulder when he jumped off a cliff into a lake, explaining that "it has bothered him ever since. Since then, the right one has become painful too". There is no mention of a work connection to the shoulder pain.[3] On October 9, 2008, claimant was examined by Gino Salerno, PA, in Dr. Albright's office who, in an office note, mentioned claimant's shoulder pain, with a notation that claimant has been doing physical work and his shoulders were very painful. The physician assistant notes from October 15, 2008, fail to mention a work-related connection to claimant's shoulder pain.

Claimant indicated he went to see Dr. Spitzer about his shoulders and was referred to a specialist Scott Goin, M.D. The initial October 31, 2008, office notes from Dr. Goin discuss claimant's initial left shoulder pain and that claimant does not recall a specific injury. A November 17, 2008, MRI displayed a full thickness tear in the left rotator cuff. Followup notes with Dr. Goin and his physician assistants Daric T. Neuschafer and David L. Stoll, fail to mention any work-related injury. Surgery on the left shoulder was performed on December 4, 2008.

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[2] R.H. Trans. at 16.

[3] Fluter Depo. (Oct. 30, 2014), Ex. 3 at 7.

An MRI of the right shoulder on March 10, 2009, identified a full thickness tear of the rotator cuff. The followup office note of March 16, 2009, discusses the tear, noting claimant denied any injury. Surgery on the right shoulder was performed on March 26, 2009.

Medical notes dated December 2, 2008, from Promise Regional Medical Center discuss claimant's injuries from when claimant jumped off a cliff, with an injury date in June 2000. No work injury is mentioned. Followup notes from December 4, 2008, discuss a planned left shoulder arthroscopy, stemming from an old injury.[4] When claimant returned to Promise Regional on March 26, 2009, for right shoulder arthroscopy, the reason for the shoulder pain was jumping into a lake.[5]

Claimant did not return to work after his surgery. Claimant was laid off on June 4, 2009, and has not worked anywhere since. He continued to have shoulder pain. He denied any ongoing problems with his neck.

Kristy Brunk, environmental health and safety technician for respondent, indicated she is considered the records custodian for respondent. Ms. Brunk indicated claimant was paid short-term disability through Hartford, and that Hartford will not pay short-term disability if an injury is work-related and covered by workers compensation.

In Exhibit No. 2 of Ms. Brunk's deposition, there is a Medical Dept. R.T.W.P. Notice To Supervisor form indicating a service date of December 4, 2008, with claimant being absent from work from December 4, 2008, to January 29, 2009. There is also a designation that claimant was "injured off the job".[6] A Return To Work Permit, also in Exhibit No. 2 indicates claimant suffered "other injury or accident" with the designation for an "injury on the job at AGCO Corp." left blank.[7]

On February 1, 2010, claimant met with Pedro A. Murati, M.D., for examination at the request of his attorney. Claimant reported being injured due to the repetitive nature of his job duties. Dr. Murati noted claimant informed him he was never asked to file a workers compensation claim and that respondent's medical department told him to write down he had muscle spasms. Claimant complained of popping and grinding in both shoulders; inability to bend his right arm; both arms fall asleep; pain and a lump in the right biceps; pain in the upper neck. During the examination, claimant reported noticing, for the first time, tenderness in his upper back.

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[4] Fluter Depo. (Oct. 30, 2004), Ex. 3 at 15.

[5] *Id.,* Ex. 3 at 18

[6] Brunk Depo., Ex. 2 at 28.

[7] *Id.*, Ex. 2 at 29.

Dr. Murati's impression of claimant's condition was status post surgery left shoulder arthroscopy, rotator cuff repair, acromioplasty and decompression, distal clavicle excision, biceps stump debridement; status post surgery right shoulder arthroscopy, rotator cuff repair, acromioplasty and decompression. He also found claimant to have myofascial pain syndrome affecting the left shoulder girdle extending into the thoracic paraspinals.

Dr. Murati opined that claimant's current diagnoses were, within reasonable medical probability, a direct result of the work-related injury in October 2008. He recommended for the myofascial pain syndrome affecting the left shoulder girdle, physical therapy, cortisone trigger point injections and medication for inflammation and muscle spasms. For the left shoulder he recommended a repeat MRI with intra articular contrast. Further treatment depended on the findings of the MRI. Dr. Murati found claimant at maximum medical improvement for the right shoulder. He assigned temporary restrictions.

Claimant met with George G. Fluter, M.D., on June 16, 2014, for an examination at the request of his attorney. Claimant reported constant pain in both shoulders, weakness, trouble lifting heavy objects and numbness in his left arm.

Dr. Fluter examined claimant and assessed the following conditions: bilateral shoulder pain/impingement/tendonitis/bursitis; bilateral shoulder internal derangement; bilateral upper extremity repetitive use/cumulative trauma disorder; status post left shoulder surgery, 12/4/08; status post right shoulder surgery, 3/26/09; neck/upper back pain; cervicothoracic strain/sprain; myofascial pain affecting the neck/upper back, upper shoulders, and scapular stabilizers.

Dr. Fluter opined that, based on the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between claimant's current condition and the repetitive activities involving the upper extremities and their sequelae. He found the activities to be over and above those associated with routine activities of daily living.

Dr. Fluter assigned a combined 32 percent whole body total permanent partial impairment (27 percent was attributed to the right upper extremity (16 percent whole body) and 24 percent was attributed to the left upper extremity (14 percent whole body). He also assigned restrictions including no lifting, carrying, pushing or pulling to 20 pounds occasionally and 10 pounds frequently; avoid holding the head and neck in awkward and/or extreme positions; restrict activities at or above shoulder level using each arm to occasional; and restrict activities greater than 24 inches away from the body with both arms to occasional. No specific treatment recommendations were made, but Dr. Fluter opined future medical would be likely.

Dr. Fluter was asked to render an opinion on task loss for claimant, based upon a task list prepared by Dr. Barnett. Dr. Fluter determined claimant could no longer perform 5 out of 7 tasks within his restrictions, which computes to a 71.4 percent task loss.

Claimant met with Robert W. Barnett, Ph.D., by telephone on two occasions in December 2014 to discuss his work history, involving a work injury on October 16, 2008. Dr. Barnett opined claimant has a 100 percent wage loss as he is not working. Dr. Barnett identified 6 tasks claimant had preformed over the previous 15 years.[8]

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[9]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[10]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[11]

K.S.A. 2009 Supp. 44-508(d)(e) states:

> (d) ''Accident'' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative

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[8] The task list prepared by Dr. Barnett, actually contains 7 tasks because the seventh task was mistakenly numbered as a 6 instead of a 7.

[9] K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

[10] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[11] K.S.A. 2009 Supp. 44-501(a).

law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.
(e) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

K.S.A. 44-510e(a) (Furse 2000) states:

(a) If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be 66⅔% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. If the employer and

the employee are unable to agree upon the employee functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee functional impairment which shall be considered by the administrative law judge in making the final determination. The amount of weekly compensation for permanent partial general disability shall be determined as follows:
(1) Find the payment rate which shall be the lesser of (A) the amount determined by multiplying the average gross weekly wage of the worker prior to such injury by 66⅔% or (B) the maximum provided in K.S.A. 44-510c and amendments thereto;
(2) find the number of disability weeks payable by subtracting from 415 weeks the total number of weeks of temporary total disability compensation was paid, excluding the first 15 weeks of temporary total disability compensation that was paid, and multiplying the remainder by the percentage of permanent partial general disability as determined under this subsection (a); and
(3) multiply the number of disability weeks determined in paragraph (2) of this subsection (a) by the payment rate determined in paragraph (1) of this subsection (a).
The resulting award shall be paid for the number of disability weeks at the full payment rate until fully paid or modified. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.

K.S.A. 44-520 (Furse 2000) states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The Board will first determine whether claimant provided timely notice of his alleged accident in this matter. In order to so determine, a proper date of accident must be also determined. The ALJ, in effect, adopted the Board's original Order of May 19, 2010. However, in that Order a single Board Member found claimant had failed to prove he suffered a series of accidents which arose out of and in the course of his employment with respondent. That decision was made, in part due to none of clamant's treating physicians relating claimant's injuries to his work with respondent, and partially due to Dr. Murati's reference to a single accident by claimant on October 16, 2008. Based upon the evidence to date, the Board Member found claimant had failed to prove a series of accidents at work.

Since the issuance of that Order, claimant has testified at the regular hearing, several medical depositions have been taken and multiple medical reports and records have been stipulated into the record. The original Order stated "Claimant's date of accident can only be October 28, 2009, if he suffered a series of accidents".[12] That date of accident reference, while not an actual finding by the Board Member, is proven accurate in this record.

Claimant has testified to a series of accidents, not a single traumatic event. K.S.A. 2009 Supp. 44-508(d) sets out the criteria by which a series of cumulative traumas may establish the "legal" date of accident. Here, claimant was not provided authorized medical treatment under the Workers Compensation Act (Act). Therefore, neither of the first two criteria have been met. While claimant's condition has been diagnosed as work-related, the first criteria to be met herein occurred on October 28, 2009, when the demand letter from claimant's attorney was received by respondent. Therefore, the date of accident is October 28, 2009, regardless of the fact claimant had not been employed by respondent for almost a year. Additionally, with the date of accident thus established, claimant also satisfies the notice provisions of K.S.A. 44-520 (Furse 2000) by providing notice within 10 days of the determined accident. The Award of the ALJ is reversed on this issue.

The Board must next determine whether claimant has satisfied his burden of proving he suffered a series of repetitive use microtraumas. Claimant has testified, and certain medical evidence supports his description of the snapping in his shoulders while lifting at work. However, the initial medical evidence, created contemporaneously with claimant's work for respondent, fails to mention any work involvement connected to claimant's shoulder complaints. Instead, the records, time and again, point to the accident suffered by claimant in 2000, or denies any known injuries.

When claimant was first examined by Dr. Albright, he only mentioned the 2000 accident when he jumped off the cliff and the fact it had been bothering him ever since. There was no mention of a work connection. Claimant's initial contact with Dr. Goin

[12] Board Order (May 19, 2010) at 7.

recorded no known injury. The MRI reports in 2009, fail to mention any injuries. Claimant's medical records from Promise Regional discuss the cliff accident, but no work connection.

While Dr. Murati and Dr. Fluter attribute claimant's ongoing shoulder problems to the work with respondent, claimant's medical history contradicts those determinations. The contemporaneous medical records identify the cliff accident in 2000, but not claimant's work for respondent.

It is claimant's burden to prove he suffered a work-related accident or series of traumas while working for respondent. He has failed to satisfy that burden. The denial of benefits by the ALJ is affirmed.

K.S.A. 44-555 (Furse 2000) states:

> The director or the administrative law judge, whoever is conducting the hearing or other proceeding is hereby authorized to assess all or a part of the certified shorthand reporter's fees to any party to the proceedings for compensation and shall note the amounts assessed on the findings, award or order.

K.A.R. 51-2-4 states:

> (a) Each shorthand reporter who takes and transcribes the proceedings at a hearing or testimony at a deposition, either of which is to be used as evidence in a claim before the division of workers compensation, shall furnish the original transcript of that hearing or deposition to the administrative law judge, one copy to the employer, insurance carrier or its attorney, and one copy to the claimant or the claimant's attorney.
> (b) In cases involving the workers compensation fund, the reporter shall also furnish one copy of the transcript of hearing or deposition to the attorney representing that fund.
> (c) In settlement cases, the reporter shall furnish the original transcript to the director within two weeks. The transcript of the settlement hearing shall constitute a written final award. Copies of the settlement transcript shall be furnished to other parties only on request. Settlement transcripts shall be bound only by stapling without front or back covers. Reporters' fees in settlement cases shall be paid by the respondent unless otherwise indicated in the settlement.
> (d) The fees of the reporter for hearings and depositions, including all copies furnished as provided above, shall be paid by the respondent upon completion of the transcript by the reporter. The fees shall be assessed by the administrative law judge in the final award. If the fees are assessed against a party other than the respondent and if the respondent has paid the fees, the party against whom they are assessed shall make the necessary reimbursement.
> (e) A determination of the reasonableness of a reporter fee shall be made by the administrative law judge if this fee is challenged.

K.S.A. 2009 Supp. 44-555c(a) states:

> (a) There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge. The board shall be within the division of workers compensation of the department of labor and all budgeting, personnel, purchasing and related management functions of the board shall be administered under the supervision and direction of the secretary of labor. The board shall consist of five members who shall be appointed by the secretary in accordance with this section and who shall each serve for a term of four years, except as provided for the first member appointed to the board under subsection (f).

Both by statute and by administrative regulation, the ALJ is authorized to assess the fees of a court reporter for hearing and deposition transcripts against any party to the litigation. Respondent contends claimant's pursuit of this matter is meritless and all fees should be assessed against claimant and/or his attorney. It must first be noted this issue does not appear to have been raised to the ALJ. It was not raised at the regular hearing and is not listed in respondent's submission letter to the ALJ. As such, the Board normally does not consider issues not raised to and not decided by the ALJ. However, respondent's contention that claimant's pursuit of this matter is meritless necessitates consideration.

Here, the ALJ found timely notice by claimant to be deficient. That decision was reached without a determination of the statutory date of accident. This issue, which was reversed above, needed to be addressed. Claimant's pursuit of this issue on appeal was not meritless.

Additionally, claimant has provided sufficient evidence of his position to make the issue whether he suffered personal injury by accident or repetitive trauma arising out of and in the course of his employment with respondent worthy of consideration by both the ALJ and the Board. Claimant provided medical evidence supporting his position, although the overall record did not support his contentions. The Board finds it inappropriate to assess the costs of this litigation against claimant or his attorney.

The Board is concerned that claimant failed to file a submission letter to the ALJ as required by K.A.R. 51-3-5, and did not file a brief with the Board. Briefs inform the fact finder and the opposing party of disputed issues and arguments in support of a parties position. However, the failure by a party to file a brief does not equate to a meritless claim.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be reversed on the issue of timely notice, but affirmed with regard to claimant's contentions of a work-related accident or repetitive trauma. While claimant established a statutory date of accident and timely notice of that date, claimant failed to prove he suffered personal injury by accident or repetitive trauma stemming from his employment with respondent. The denial of benefits in this matter is affirmed. Respondent's request to have the fees generated in this litigation assessed against claimant and/or his attorney is denied.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated April 8, 2016, denying claimant an award in this matter is affirmed as above noted.

IT IS SO ORDERED.

Dated this _____ day of September, 2016.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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